



February 17, 1999

Ms. Jennifer D. Soldano
Associate General Counsel
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701-2483

OR99-0482

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID numbers 123537 and 122084.

The Department of Transportation ("TXDOT") received a request from Longview Asphalt for information related to TXDOT's investigation of case number 98-HQ-M-C-537. TXDOT received another request for this information. As the information in these requests is identical, we shall address both requests in this opinion. You contend the requested information is excepted from public disclosure by sections 552.101, 552.102, 552.103 and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The TXDOT has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4. (1990) The TXDOT must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986) and authorities cited therein. To demonstrate that litigation is reasonably

anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You have submitted information to this office showing that a complaint regarding the subject of this report has been filed with the Texas Commission on Human Rights (the "TCHR") alleging discrimination or retaliation. The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The Equal Employment Opportunity Commission ("EEOC") defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.*

This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). By showing that the complaint filed with the TCHR is pending, you have shown that litigation is reasonably anticipated. Our review of the records at issue also shows that they are related to the anticipated litigation for purposes of section 552.103(a). Thus, you may withhold requested information pursuant to section 552.103(a).

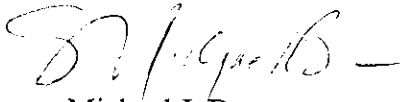
Note that once information has been obtained by an opposing party to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). In this instance, the statements of the individual who filed the complaint, and all correspondence from or to that individual are not excepted from disclosure by section 552.103. We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

Section 552.101 of the Government Code excepts from disclosure information considered confidential by statute, constitution or court decision. The identity of witnesses in investigations of sexual harassment is considered confidential by court decision on grounds of privacy. *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). Further, Government Code section 552.023 prevents a governmental body from denying access to information to a person solely on the basis of laws intended to protect that person's privacy. Therefore the identities of witnesses in an investigation of sexual harassment must be redacted from any information released to the public. The identity of a witness shall not however be redacted from information released to that witness.

In conclusion, with the exception of those documents that were previously obtained by a party opponent, you may withhold the responsive information, with appropriate redactions as indicated above.

As the above discussion encompasses all of the responsive information, we shall not address the other exceptions to disclosure that you have raised. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Michael J. Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID#s 122084 and 123537

Enclosures: Submitted documents

cc: Mr. Rodney Price
Longview Asphalt
P.O. Box 3661
Longview, Texas 75606
(w/o enclosures)

Ms. Marcia Fertitta
105 B. Valentine
Longview, Texas 75604
(w/o enclosures)